REMARKS

Claims 1, 3, 5, 7-30, 32, 34, 36, 38, 40, 42, 44, and 46 have been cancelled without prejudice. Applicant reserves the right to pursue the subject matter of the cancelled claims in a related application. Claims 2, 37, 39, 41, 43, 45 and 47 have been amended. Support for the amendments can be found in the Claim 1 and in the Specification as filed, for example on page 7, paragraph [0047]. Therefore, no new matter has been introduced by these amendments. The following addresses the substance of the Office Action.

Restriction Requirement

Restriction to one of the following inventions was required under 35 USC 121:

Group I Claims 1-11 and 36-47, drawn to a microbially active peptide, classified in class 530, subclass 326

Group II Claims 12-35, drawn to a nucleic acid molecule, classified in class 536, subclass 23.4.

It is Applicant's understanding that Claims 30-35 which are drawn to a method of using the microbially active peptide were restricted out of Group I in error. Therefore, in response to the Restriction Requirement, Applicant elects Group I, that is claims 1-11 and 30-47.

Additionally, an election of Species was required: (a) SEQ ID NO: 1; (b) SEQ ID NO: 2; and (3) SEQ ID NO: 3. Applicant elects species of SEQ ID NO: 2 and traverses: sequences of SEQ ID NO: 2 and SEQ ID NO: 3 are not structurally different, as they only differ by 1 amino acid as follows: SEQ ID NO: 2 is amino acid residues 63-110 of DCD, while SEQ ID NO: 3 is amino acids 63-110 of DCD. It is Applicant's understanding that upon allowance of a generic claim, Applicant will be entitled to consideration of additional species which are written in dependent form or otherwise include all the limitations of an allowed generic claims as provided by 37 CFR 1.141. Currently, Claims 2, 31, 37 and 43 are generic.

Priority

In accordance with 37 CFR 1.55, Applicant is submitting a certified English translation of the German Patent Application No.: 101 29 983.4, filed June 13, 2001, to which this application claims priority.

Specification

The Examiner has requested amending the Specification to include SEQ ID Nos. Applicant has amended the Specification accordingly.

Sequence Listing

Applicant has amended the Sequence Listing to include the sequence of SEQ ID NO: 7 present in the Specification as filed, on page 9, paragraph [0058] and hereby directs the amended Sequence Listing to be included into the Specification.

Claim Objections

The Examiner has objected to Claim 7 for reciting "residues" instead of "residue". Claim 7 has been canceled without prejudice, therefore this objection is now moot.

The Examiner has objected to Claims 36-39 and 42-45 under 37 CFR 1.75(c), as being failing to further limit the subject matter of a previous claim. Applicant has canceled Claims 36, 38, 42, and 44 without prejudice and amended Claims 37, 39, 43, and 45 to recite additional limitation of the effective amount of the peptide as "1 to 50 μg". Support for these amendments can be found in the Specification as filed on page 7, paragraph [0047]. Therefore, claims 37, 39, 43, and 45 are now further limiting and therefore proper.

Novelty

The Examiner has rejected Claims 1-4, 7-11, 36-39, and 42-45 under 35 USC §102(b) as being allegedly anticipated by Akerblom et al. (USP 5,834,192). To be anticipatory under 35 U.S.C. § 102, a reference must teach each and every element of the claimed invention. See Hybritech Inc. v. Monoclonal Antibodies, Inc., 802 F.2d 1367, 1379 (Fed. Cir. 1986). "Invalidity for anticipation requires that all of the elements and limitations of the claim are found within a single prior art reference. ...There must be no difference between the claimed invention and the reference disclosure, as viewed by a person of ordinary skill in the field of the invention." See Scripps Clinic & Research Foundation v. Genentech, Inc., 927 F.2d 1565 (Fed. Cir. 1991).

Akerblom et al. describe an HCAP protein, 110 aa long, suggested to be involved in cancer-induced cachexia. Akerblom et al. does not disclose a peptide comprising a maximum of 50 amino acid residues from the C-terminal region of this peptide (called DCD in this application). Akerblom et al. does not disclose that this fragment has antimicrobial properties.

Therefore, Akerblom et al. does not anticipate currently amended Claims 2, 4, 37, 39, 43 and 45, and the rejection of these claims under 35 USC §102(b) should be withdrawn.

The Examiner has rejected Claims 1-4, 7-11, 36-39 and 42-45 under 35 USC §102(a) as being allegedly anticipated by Schittek et al. (*Nature Immunol.* 2001 **2**:1133-1137). The law is: "A person shall be entitled to a patent unless -(a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for patent." Because the present application claims the benefit of priority of the German Patent Application No.: 101 29 983.4, filed June 13, 2001, and Schittek et al. was published on November 5 2001, this reference is not prior art. Therefore this rejection should be withdrawn.

For all of the above reasons, Applicants respectfully request withdrawal of all rejections under 35 U.S.C. § 102, and allowance of the pending application.

CONCLUSION

Applicants have endeavored to address all of the Examiner's concerns as expressed in the outstanding Office Action. Accordingly, amendments to the claims, the reasons therefor, and arguments in support of the patentability of the pending claim set are presented above. In light of the above amendments and remarks, reconsideration and withdrawal of the outstanding rejections is specifically requested. If the Examiner finds any remaining impediment to the prompt allowance of these claims that could be clarified with a telephone conference, the Examiner is respectfully requested to initiate the same with the undersigned.

Please charge any additional fees, including any fees for additional extension of time, or credit overpayment to Deposit Account No. 11-1410.

Respectfully submitted,

KNOBBE, MARTENS, OLSON & BEAR, LLP

Dated: August 19, 2005

By: _____

Marina L. Gordey
Registration No. 52,950
Agent of Record
Customer No. 20,995
(805) 547-5580

1851072
080505